

1
2
3
4
5
6 UNITED STATES DISTRICT COURT
7 DISTRICT OF NEVADA

8 * * *

9 JAMES KENNETH FLOYD,

Case No. 3:17-cv-00400-MMD-WGC

10 Petitioner,

ORDER

11 v.

12 WARDEN BACA, et al.,

13 Respondents.

14
15 Petitioner James Kenneth Floyd has submitted a *pro se* petition for writ of habeas
16 corpus pursuant to 28 U.S.C. § 2254 (ECF No. 1-1). His application to proceed *in forma*
17 *pauperis* will be granted (ECF No. 1). Floyd challenges his judgment of conviction in state
18 case no. C-14-296625-1. The Court has reviewed the petition pursuant to Habeas Rule
19 4, and it will be docketed and served on respondents.¹

20 A petition for federal habeas corpus should include all claims for relief of which
21 petitioner is aware. If petitioner fails to include such a claim in his petition, he may be
22 forever barred from seeking federal habeas relief upon that claim. See 28 U.S.C.
23 §2254(b) (successive petitions). If petitioner is aware of any claim not included in his
24 petition, he should notify the court of that as soon as possible, perhaps by means of a
25 motion to amend his petition to add the claim.

26
27 ¹The court notes that Floyd has submitted a second federal habeas petition in
28 case no. 3:17-cv-00459-MMD-VPC that appears to challenge a different judgment of
conviction (state case no. 16EW00112B).

1 Petitioner has also submitted a motion for appointment of counsel (ECF No. 1-3).
2 There is no constitutional right to appointed counsel for a federal habeas corpus
3 proceeding. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Bonin v. Vasquez*, 999
4 F.2d 425, 428 (9th Cir.1993). The decision to appoint counsel is generally discretionary.
5 *Chaney v. Lewis*, 801 F.2d 1191, 1196 (9th Cir.1986), cert. denied, 481 U.S. 1023 (1987);
6 *Bashor v. Risley*, 730 F.2d 1228, 1234 (9th Cir.), cert. denied, 469 U.S. 838 (1984).
7 However, counsel must be appointed if the complexities of the case are such that denial
8 of counsel would amount to a denial of due process, and where the petitioner is a person
9 of such limited education as to be incapable of fairly presenting his claims. See *Chaney*,
10 801 F.2d at 1196; see also *Hawkins v. Bennett*, 423 F.2d 948 (8th Cir.1970). Here, Floyd's
11 petition is clear in presenting the issues that he wishes to raise, and the legal issues are
12 not particularly complex. Therefore, counsel is not justified at this time. Floyd's motion is
13 denied.

14 It is therefore ordered that petitioner's application to proceed *in forma pauperis*
15 (ECF No. 1) is granted.

16 It is further ordered that the Clerk file and electronically serve the petition (ECF No.
17 1-1) on the respondents.

18 It is further ordered that the Clerk add Adam Paul Laxalt, Nevada Attorney General,
19 as counsel for respondents.

20 It is further ordered that respondents must file a response to the petition, including
21 potentially by motion to dismiss, within ninety (90) days of service of the petition, with any
22 requests for relief by petitioner by motion otherwise being subject to the normal briefing
23 schedule under the local rules. Any response filed must comply with the remaining
24 provisions below, which are entered pursuant to Habeas Rule 5.

25 It is further ordered that any procedural defenses raised by respondents in this
26 case must be raised together in a single consolidated motion to dismiss. In other words,
27 the Court does not wish to address any procedural defenses raised herein either *in*
28 *seriatum* fashion in multiple successive motions to dismiss or embedded in the answer.

1 Procedural defenses omitted from such motion to dismiss will be subject to potential
2 waiver. Respondents must not file a response in this case that consolidates their
3 procedural defenses, if any, with their response on the merits, except pursuant to 28
4 U.S.C. § 2254(b)(2) as to any unexhausted claims clearly lacking merit. If respondents
5 do seek dismissal of unexhausted claims under § 2254(b)(2): (a) they shall do so within
6 the single motion to dismiss not in the answer; and (b) they shall specifically direct their
7 argument to the standard for dismissal under § 2254(b)(2) set forth in *Cassett v. Stewart*,
8 406 F.3d 614, 623-24 (9th Cir. 2005). In short, no procedural defenses, including
9 exhaustion, shall be included with the merits in an answer. All procedural defenses,
10 including exhaustion, instead must be raised by motion to dismiss.

11 It is further ordered that, in any answer filed on the merits, respondents must
12 specifically cite to and address the applicable state court written decision and state court
13 record materials, if any, regarding each claim within the response as to that claim.

14 It is further ordered that petitioner will have forty-five (45) days from service of the
15 answer, motion to dismiss, or other response to file a reply or opposition, with any other
16 requests for relief by respondents by motion otherwise being subject to the normal briefing
17 schedule under the local rules.


18 It is further ordered that any additional state court record exhibits filed herein by
19 either petitioner or respondents must be filed with a separate index of exhibits identifying
20 the exhibits by number. The CM/ECF attachments that are filed further must be identified
21 by the number of the exhibit in the attachment.

22 It is further ordered that the parties must send courtesy copies of all exhibits in this
23 case to the Clerk of Court, 400 S. Virginia St., Reno, NV, 89501, directed to the attention
24 of "Staff Attorney" on the outside of the mailing address label. Additionally, in the future,
25 all parties shall provide courtesy copies of any additional exhibits submitted to the court
26 in this case, in the manner described above.

27 It is further ordered that the Clerk shall file petitioner's motion for appointment of
28 counsel (ECF No. 1-2).

1 It is further ordered that petitioner's motion for appointment of counsel (ECF No.
2 1-2) is denied.

3
4 DATED THIS 7th day of November 2017.

5 
6 _____
7 MIRANDA M. DU
8 UNITED STATES DISTRICT JUDGE
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28